Appeal of PELRB Decision No. 2016-233 withdrawn.

MANDATE
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Clerk/Deputy Clerk 7/27/17
Date

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2017-0091, Appeal of Prospect Mountain High School Board, the court on July 14, 2017, issued the following order:

On July 7, 2017, counsel for the Prospect Mountain High School Board filed correspondence withdrawing this appeal because "the parties have come to an agreement resolving the issues in this matter." Accordingly, the appeal is deemed withdrawn.

Appeal withdrawn.

This order is entered by a single justice (Hicks, J.). See Rule 21(7).

Eileen Fox,
Clerk

Distribution:
New Hampshire Public Employee Labor Relations Board, E-0108-7
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Appeal to NH Supreme Court withdrawn on 07-14-2017 (NH Supreme Court Case No. 2017-0091)

STATE OF NEW HAMPSHIRE
Public Employee Labor Relations Board

Prospect Mountain High School Teachers' Association, NEA-NH

v.

Prospect Mountain High School Board

Case No. E-0108-7
Decision No. 2016-233

Appearances:

Christopher Long, UniServ Director, NEA-NH, Concord, NH for the Prospect Mountain High School Teachers' Association, NEA-NH

Kathleen C. Peahl, Esq., Wadleigh, Starr & Peters, P.L.L.C., Manchester, NH for the Prospect Mountain High School Board

Background:

On December 22, 2015, the Prospect Mountain High School Teachers' Association, NEA-NH (Association) filed an unfair labor practice complaint alleging, among other things, that the Prospect Mountain High School Board (Board or District) unilaterally changed working conditions when it failed to approve a bargaining unit employee's professional development travel expenses allowed under the parties' collective bargaining agreement (CBA) and past practice. The Association asserts that the Board's actions violated RSA 273-A:5, I (a), (b), (c), (e), (h), and (i)[1]. The Association requests, among other things, that the PELRB order the Board

[1] Although the Association's December 22, 2015 complaint, contained allegations of unilateral change in working conditions (i.e. a failure to negotiate in good faith per *Appeal of Hillsboro-Deering Sch. Dist.*, 144 N.H. 27, 30 (1999)), it did not state specifically that the Board violated subsection (e) of RSA 273-A:5, I (prohibiting public employers from refusing to negotiated in good faith). At the beginning of the hearing, the Association's representative explained that the omission of subsection (e) from the list of alleged RSA 273-A:5, I violations was a scrivener's error and sought to amend the complaint to add subsection (e). The Association's request to amend was granted over the District's objection.

to cease and desist from violating RSA 273-A:5, I and to comply with the terms and conditions of employment in accordance with the CBA and past practice.

The Board denies the charges and asserts, among other things, that its actions were an exercise of its management rights. The Board seeks dismissal of the complaint on the grounds that the complaint is untimely under RSA 273-A:6, VII; that the Association failed to exhaust the appeal process under the CBA; and that some of the Association's claims are moot. The Board requests that the PELRB deny the unfair labor practice charge and dismiss the complaint.

An adjudicatory hearing was originally scheduled for February 4, 2016 but, at the parties' request, was continued several times. The hearing was conducted on June 7, 2016 at the Public Employee Labor Relations Board (PELRB) offices in Concord. The parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. The parties filed post-hearing briefs on August 1, 2016, and the decision is as follows.

Findings of Fact

1. The Board is a public employer within the meaning of RSA 273-A:I, X.

2. The Association is the certified exclusive bargaining representative for "[a]ll full time and part time Teachers, Library Media Specialists, Occupational Therapists, Curriculum Leaders, and Department Chairs of the Prospect Mountain High School." See PELRB Decision No. 2011-071 (March 11, 2011).

3. The Association and the Board are parties to a CBA effective from July 1, 2015 through June 30, 2017. See Joint Exhibit A.

4. The parties' CBA contains a three step grievance procedure culminating in appeal to the School Board. The CBA Article 8.3.7 provides that the "action of the Board shall be final except as State or federal law provides subsequent action [sic]." See Joint Exhibit A. The CBA does not provide for binding arbitration or any other binding grievance resolution.

5. Article 9.4 of the CBA, titled The Prospect Mountain School Board Policy Manual, provides that "[t]he Board shall provide the Association with a current and updated copy of the completed policy manual annually. All policies shall be applied and enforced fairly and equitably." See Joint Exhibit A.

6. The parties' CBA does not contain a provision addressing "management rights."

7. Article 4.3 of the CBA, titled Professional Improvement, addresses different aspects of bargaining unit employees' professional improvement and contains several subsections/articles, including Article 4.3.1. Article 4.3.1 addresses the reimbursement of expenses related to professional improvement and provides as follows:

> The Board agrees to pay an amount not less than $2,000.00 for each teacher for professional improvement. The Board will pay, in advance, the full tuition costs and laboratory fees to a maximum of $2,000.00 per teacher per year for courses, workshops, seminars approved in advance by the Superintendent or his designee. The professional development year shall be July 1 to June 30.
>
> The Board will only pay lodging/travel expenses for conferences/workshops that require traveling fifty (50) miles or more from the teacher's residence. The Board will reimburse mileage to and from conferences/workshops at the standard IRS rate.

See Joint Exhibit A. This language has not been changed since at least 2004.

8. Board's Finance Committee members review purchase orders related to professional improvement reimbursement expenses and the Board's Treasurer signs the reimbursement checks.

9. Article 4.3.2 provides that "[a]ll courses, which it is the intent of the teacher to use for salary incrementation, shall be submitted to the Superintendent for approval. The Board shall be under no obligation to grant salary credit for any course that has not been approved." See Joint Exhibit A.

10. Article 4.3.3. provides as follows:

> Approvable courses shall be graduate-level courses and shall be either subject matter of professional education courses, which relate to the teacher's assignment or undergraduate courses in technology for the purpose of professional improvement. Courses presented for approval should have specific description. Office transcripts or credentials from the institution at which courses were taken indicating successful completion must be presented for salary track movement…

See Joint Exhibit A.

11. Article 4.3.4 provides that "[i]f a teacher does not complete the course or fails to make a grade of (B) or better, he/she will have the amount that was paid in advance, deducted from his/her last check. Written authorization will be given to the Board to deduct the difference from the teacher's last paycheck." See Joint Exhibit A.

12. Article 4.3.7 provides as follows:

> The Superintendent or his designee shall, in the first instance, exercise judgment under the provisions of this section and said judgment shall be subject to direct appeal to the Board. The Board's judgment shall be final and not subject to the grievance procedure.

See Joint Exhibit A.

13. Article 4.3.8 provides that "[t]eachers may use professional development monies to pay for recertification costs and fees." See Joint Exhibit A.

14. Article 10.3.1, titled Track Movement, provides that "[u]pon attainment of the necessary credits from graduate-level courses, an employee shall provide the central office with the necessary proof and the employee's salary shall be adjusted effective at the start of the following contract year." See Joint Exhibit A.

15. Article 11.1, titled Agreement Changes, provides that the "agreement may not be altered, changed, added to, deleted from or modified without the voluntary, mutual consent of the parties in a written and signed amendment to this agreement." See Joint Exhibit A.

16. During the negotiations for the current CBA, the Board proposed a revision to Article 4.3.1. See Stipulations at C. The Board proposed the following addition to the Article

4.3.1. language:

> The Board will only pay lodging and travel expenses for a teacher who is receiving an award or for professional recognition at a conference or workshop. All expenses are subject to the approval of the superintendent.
>
> When an approved course or workshop includes in their total cost any gift of technology hardware or software with a value of one hundred dollars ($100) or more the hardware or software remains the property of Prospect Mountain High School.
>
> In no event may a teacher repeat a like or similar course or workshop that has been previously attended without the direct authorization of the superintendent.

See Association Exhibit 7. According to Association Vice President Andrea Caruso, the Association rejected this proposal.

17. The Board subsequently withdrew its proposal for amendment to Article 4.3.1. See Stipulations at D.

18. The parties reached agreement on the 2015-17 contract in November of 2014 although the CBA was not signed until March 31, 2015. The language of the CBA Article 4.3.1. has not been changed.

19. After the conclusion of the parties' contact negotiations, the Board unilaterally drafted a new policy, titled Prospect Mountain High School Professional Improvement (policy PI), in January of 2015. The policy PI provides in part as follows:

> The Prospect Mountain High School Board has an interest in providing an avenue for teachers to further their content knowledge, management skills, and teaching methodologies, including the integration of technology. Funding is available for teachers to engage in professional improvement activities that will enhance their teaching skills and provide a better learning environment for students.
>
> To that end, this policy and related regulations are intended to address matters related to teacher professional improvement that are not directly stated in the pertinent collective bargaining agreement. The board recognizes that the collective bargaining agreement will take precedence over any provision of this policy that may be contrary to the language of the collective bargaining agreement.

Coursework, Workshops, Seminars and Conferences

Coursework, workshops, seminars and conferences shall be paid for in accordance with the guidelines developed in the collective bargaining agreement (see 4.3 Professional Improvement; Items 4.3.1-4.3.6). Per the Collective Bargaining Agreement dated July 1, 2013 to July 1, 2015.

Lodging/Travel Expenses

Prospect Mountain High School will only pay lodging/travel expenses for workshops, seminars and conferences that require traveling fifty (50) miles or more from the teacher's residence.

The rate for mileage reimbursement to and from workshops, seminars and conferences shall be the standard IRS rate.

The per diem rate for meals not included in a workshop, seminar or conference package shall not exceed Sixty-five Dollars ($65) per day... Receipts must be provided for reimbursement up to the maximum amount and must be itemized.

Lodging expenses shall be based on the local prevalent rates for a three star rated single room but shall in no event exceed Two Hundred Sixty Dollars ($260.00) per day before taxes and usury fees, and will only be paid for the required attendance dates of the workshop or conference.

All efforts should be made when attending seminars, workshops or conferences to select those in New Hampshire or contiguous states. When travel outside of the region is necessary, additional justification of the positive impact attending this conference will have upon Prospect Mountain High School may be required. Exceptions may be presenting at a national conference, or receiving an award or recognition at a national conference. In any case, attendance at any workshop, seminar or conference requires the approval of the Superintendent.

...

Appeals

The Superintendent shall exercise judgment under the provisions of this policy and said judgment shall be subject to direct appeal to the Prospect Mountain High School Board. The Prospect Mountain High School Board's judgment shall be final and not subject to grievance.

See Joint Exhibit B. The Board unanimously approved this policy "for a second reading" during the Board meeting on February 3, 2015. See Joint Exhibit G.

20. At the meeting on March 3, 2015, the Board approved the amendment to the

policy PI and unanimously voted to accept the policy as amended "for a final reading." See Joint Exhibit G.

21. According to Board member Steven Miller, the new policy PI became necessary because of "systemic abuse" of the CBA professional improvement reimbursement provision by the employees.

22. On June 4, 2015, Association Secretary Jamie Bolduc asked Executive Assistant to the Superintendent/Human Resources (HR) Manager Sharon Patterson when the new professional improvement policy went into effect. Ms. Patterson responded that the policy "will be put in effect on July 1." See Joint Exhibit I.

23. On September 2, 2015, Samantha Bravar, a bargaining unit employee, filed a request for advance payment/reimbursement approval (request for reimbursement) to attend a conference in Boston, Massachusetts on November 13-15, 2015. Ms. Bravar's supervisor initially approved this activity and recommended it for reimbursement. See Joint Exhibit D.

24. The approved conference in Boston required travel of more than fifty miles from Ms. Bravar's residence. See Stipulations at G.

25. On September 9, 2015, Ms. Bravar informed HR Manager Sharon Patterson, upon her request, that she was planning to stay at the hotel for three nights, Thursday, Friday and Saturday, while attending the conference in Boston. See Joint Exhibit E. Ms. Bravar intended to arrive to Boston the night before the conference in order to be able to attend early morning pre-conference workshops.

26. In response to Ms. Bravar's inquiry as to whether her request has been approved, Ms. Patterson stated:

> J[2] did approve it, but I must warn you the board may not approve the Thursday night. They feel Boston is within driving distance for a morning meeting. We will

[2] "J" stands for Principal James Fitzpatrick.

> put it through to see what happens. The days for your food would be Friday, Saturday and Sunday.

See Joint Exhibit E.

27. Ms. Bravar was denied reimbursement for an overnight hotel stay on the night before an approved conference in Boston in 2015. See Stipulations at F.

28. On September 10, 2015, HR Manager Patterson sent the email message to Ms. Bravar informing her that "Thursday night will not be approved for the school to pay for. I have attached and highlighted the policy that the Board based that decision on." See Stipulations at H and Joint Exhibit E. The policy PI was attached to the message.

29. Ms. Bravar did not appeal the denial to the School Board. See Stipulations at I.

30. After the denial of her request, Ms. Bravar contracted the Association with questions about the policy PI. The Association requested the meeting with the Board and asked that the policy PI be withdrawn. The Board did not withdraw the policy PI.

31. The Board amended policy PI effective January 5, 2016. See Stipulations at E. The relevant provisions of the amended policy PI are substantially similar to the original policy PI. See Joint Exhibit C.

32. Since at least 2009, the District regularly reimbursed bargaining unit employees' expenses for a hotel stay on a night before the professional improvement conference/workshop. The past hotel "night before" stays that were approved for reimbursements include the following: Ms. Bravar (November, 2009 conference in Boston, MA and July, 2012 conference in Las Vegas, NV); Brian Hikel (June, 2011 conference in Stowe, VT and November, 2012 conference in Burlington, VT); Andrea Caruso (November, 2013 conference in Boston, MA); Patricia Kenneally (May, 2015 conference in Peabody, MA). No such request for reimbursement has been denied prior to September, 2015 (Ms. Bravar's request).

33. The Board was aware of the practice of reimbursing bargaining unit employees for a hotel stay on the night before the approved professional improvement event and had regularly reviewed and approved such requests for reimbursement. See Findings of Fact at 8.

Decision and Order

Decision Summary

The Board's motion to dismiss is denied. The Board committed an unfair labor practice when it unilaterally changed the terms/conditions of employment concerning reimbursement for travel/lodging expenses associated with professional improvement.

Jurisdiction

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, see RSA 273-A:6. The Board's motion to dismiss is addressed below.

Discussion

I. Board's Motion to Dismiss

The Board argues that the Association's December 22, 2015 complaint should be dismissed on the ground that it is untimely under RSA 273-A:6, VII. The Board alleges that (1) the policy PI was adopted on March 3, 2015; (2) the Association was aware of it as of June 4, 2015, at the latest, because on June 4, 2015 the Association Secretary asked the HR Manager when the new policy PI would go into effect; and (3) the complaint was filed more than six month after the Association became aware of the policy adoption.

The Association counters that the complaint was timely because (1) the policy PI was not properly adopted on March 3, 2015; and (2) the Association had the right to rely on the employer representative's statement that the policy would go into effect on July 1, 2015, and the complaint was filed within six months from the effective date of the policy.

RSA 273-A:6, VII provides that the PELRB "shall summarily dismiss any complaint of an alleged violation of RSA 273-A:5 which occurred more than 6 months prior to the filing of the complaint with the body having original jurisdiction of that complaint."

In this case, the six-month limitation period was triggered, at the earliest, at the time the new policy PI went into effect and not when it was allegedly passed by the Board. See *Robin Mongeon et al. v. Thomas S. Burack, DES Commissioner and Gary Smith, President, SEA/SEIU Local*, PELRB Decision No. 2009-018 (finding triggering event for purposes of RSA 273-A:6, VII bar in case involving collection of agency fee to be actual deduction of agency fee appearing in complainants' paychecks and not effective date of fee contribution or date when complainants learned of agency fee collection). See also *Exeter Police Association v. Town of Exeter*, PELRB Decision No. 2005-107[3], affd., *Appeal of Exeter Police Association*, 154 N.H. 61 (2006). The Board's representative informed the Association that the new policy PI went into effect on or after July 1, 2015. The Association had a right to rely on this information. Like in *Exeter*, the Board in this case reserved to itself the final action on implementation of new policy. See Footnote 3.

Furthermore, the new policy was first applied to a bargaining unit employee in September, 2015. Until it was applied to an employee, the Association had no way of knowing in what manner this policy would affect bargaining unit employees, particularly in light of the policy PI statement that "collective bargaining agreement will take precedence over any provision of this policy that may be contrary to the language of the collective bargaining agreement." The Association filed its complaint on December 22, 2015, i.e. within six months

[3]This case involves the claim, among others, that the employer committed an unfair labor practice when it terminated a bargaining unit employee. In this case, the PELRB denied the Town's motion to dismiss under RSA 273-A:6, VII finding that the complaint for employee termination was filed within six months of the "triggering event." The PELRB determined that the triggering event was not the date of initial termination or a date of subsequent arbitration award but rather the date of the Town's decision as to whether to adopt the arbitration award because the Town reserved to itself the final action on employee's status.

from the effective date of the policy and within four month from the first application of the policy to the bargaining unit employees.

For the foregoing reasons, the Association's complaint was timely within the meaning of RSA 273-A:6, VII; and the Board's motion to dismiss the Association's claims on the ground of timeliness is denied.

The Board also argues that the Association's claim based on the denial of Ms. Bravar's request for reimbursement is moot because Ms. Bravar exhausted the maximum funds available to her under the CBA Article 4.3.1. The Board asserts that "there is no remedy which the PELRB could order with respect to Ms. Bravar" and this portion of the complaint must be dismissed. The Association counters that, under the CBA, $2,000 is the minimum amount of funds available to each teacher per year for professional improvement, and not the maximum amount, as argued by the Board.

Generally, the violations of RSA 273-A themselves constitute harm because they undermine the legislative purpose behind the Act, which is "to foster harmonious and cooperative relations between public employers and their employees ..." *Appeal of the City of Manchester*, 153 N.H. 289, 295-96 (2006). Under the statute, one of the reliefs that the PELRB is authorized to grant upon finding that a party had violated RSA 273-A:5 is "a cease and desist order." See RSA 273-A:6, VI. Such orders are commonly issued to stop offending conduct irrespective of the showing of damages. This indicates that commission of an unfair labor practice constitutes harm in itself and unfair labor practice claims do not require the showing of material/physical harm or damages.

In addition, "a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2287 (2012). "A case becomes moot only when it is impossible for a court to grant any effectual relief

whatever to the prevailing party... [A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.* (Citations and quotation marks omitted.)

In this case, the Association complains, among other things, that the Board committed an unfair labor practice when it unilaterally changed terms and conditions of employment related to reimbursement for professional improvement travel/lodgings expenses and denied a portion of Ms. Bravar's request for reimbursement. The evidence in this case shows that the reason for the denial of Ms. Bravar's September, 2015 request was the application of the Board's new policy PI and not the exhaustion of funds. If the Association succeeds in proving one of its claims, the violation itself will constitute harm, regardless of whether the reimbursement funds have been exhausted, and the order to ceased and desist from offending conduct would constitute effectual relief in this case. Dismissal for mootness here will permit the Board to continue to apply policy PI to bargaining unit employees, i.e. to continue the conduct the Association seeks to enjoin, and is therefore, inappropriate. For the foregoing reasons, the Board's request to dismiss the complaint on the ground of mootness is denied.

The Board also argues that the Association's claims as to the Board's denial of Ms. Bravar's request for lodging reimbursement should be dismissed because Ms. Bravar failed to exhaust contractual remedies. The Association counters that (1) it, the complainant in this case, is a separate entity from Ms. Bravar, and Ms. Bravar's alleged failure to file a contractual grievance/appeal does not prevent the Association from asserting its independent statutory right to file a complaint for violation of RSA 273-A:5; (2) the provisions of the CBA reimbursement article are not subject to the grievance procedure and, therefore, there is no remedy under the grievance procedure; and (3) the alleged violations are within the scope of RSA 273-A:5.

The PELRB "does not generally have jurisdiction to interpret the CBA when the CBA provides for final binding arbitration." *Appeal of the City of Manchester*, 153 N.H. 289, 293 (2006) (citations omitted). However, "[a]bsent a provision for binding arbitration following the grievance procedure, and with no explicit or implicit language in the contract stating that step four of the grievance procedure is final and binding on the parties, the PELRB, in the context of an unfair labor practice charge, has jurisdiction as a matter of law to interpret the contract ..." *Appeal of Hooksett Sch. Dist.*, 126 N.H. 202, 204 (1985). In this case, the parties' CBA does not provide for final and binding arbitration or any other binding grievance resolution. Therefore, the PELRB has jurisdiction to interpret the parties' CBA.

Further, under the CBA[4], Article 4.3 is excluded from the parties' grievance procedure and nothing in this Article allows the Association, as opposed to an employee, to file a request for reimbursement or an appeal if such request is denied. Under the CBA Article 4.3.7, the appeal of the Superintendent's decision is filed by the employee and the outcome affects only that individual employee, while the unfair labor practice complaint is filed by the Association on behalf of the whole bargaining unit, and not an individual employee, and the outcome of the unfair labor practice case affects all employees in the bargaining unit. It is unreasonable to require that the Association exhaust the Article 4.3.7. appeal procedure when it has no right under the CBA to utilize this appeal procedure.

Furthermore, a grievance or, in this case, an appeal is not the same as an unfair labor practice complaint. A similar issue was addressed in *Exeter Professional Firefighters Association, IAFF Local 3491 v. Town of Exeter*, PELRB Decision No. 2009-118 (June 11,

[4] The CBA Article 4.3.7 provides in relevant part as follows:

> The Superintendent or his designee shall, in the first instance, exercise judgment under the provisions of this section and said judgment shall be subject to direct appeal to the Board. The Board's judgment shall be final and not subject to the grievance procedure.

2009), reversed, *Appeal of Exeter Professional Firefighters Association, IAFF, Local 3491*, Supreme Court Case No. 2009-0774 (January 7, 2011). In *Exeter*, the PELRB dismissed the union's complaint holding that, because the parties agreed to exclude a particular CBA provision from the grievance procedure, the union was precluded from filing a breach of CBA claim under RSA 273-A, I (h) with the PELRB. The Supreme Court disagreed that the CBA language excluding a particular issue from the grievance procedure constituted a waiver of the union's statutory right to file an unfair labor practice action. *Id.*

Here, like in *Exeter*, the right to appeal is contractual, while the right to file an unfair labor practice complaint is statutory. A party to a CBA has a statutory right to bring an unfair labor practice complaint before the PELRB. See RSA 273-A:5, I. Any waiver of a statutorily protected right must be "clear and unmistakable." See *Fowler v. Town of Seabrook*, 145 N.H. 536, 539 (2000). In this case, the CBA contains no clear and unmistakable waiver of the Association's statutory right to pursue an unfair labor practice complaint before the PELRB. The CBA Article 4.3.7 language simply provides the employee with the right to appeal the Superintendent's decision to the Board, whose decision is final but not binding. It does not constitute a waiver of the Association's right to bring an unfair labor practice complaint to the PELRB. For the foregoing reasons, the Board's argument that the Association's complaint, or part thereof, should be dismissed on the ground of failure to exhaust contractual remedies is unpersuasive.

Accordingly, the Board's motion to dismiss is denied.

II. Unfair Labor Practice Claims

The Association claims that the Board violated RSA 273-A:5, I (a), (b), (c), (e), (h), and (i) when it unilaterally changed bargaining unit employees' working conditions related to professional improvement travel/lodging reimbursement and failed to approve a bargaining unit

employee's professional improvement travel expenses allowed under the parties' CBA and past practice. The Board counters, among other things, that its actions were an exercise of its management rights.

RSA 273-A:5, I provides in relevant part:

> It shall be a prohibited practice for any public employer:
>
> (a) To restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter;
>
> (b) To dominate or to interfere in the formation or administration of any employee organization;
>
> (c) To discriminate in the hiring or tenure, or the terms and conditions of employment of its employees for the purpose of encouraging or discouraging membership in any employee organization; ...
>
> (e) To refuse to negotiate in good faith with the exclusive representative of a bargaining unit ...
>
> (h) To breach a collective bargaining agreement;
>
> (i) To make any law or regulation, or to adopt any rule relative to the terms and conditions of employment that would invalidate any portion of an agreement entered into by the public employer ...

A. Unilateral Change in Terms and/or Conditions of Employment.

Under RSA 273-A:3, I, public employers and exclusive representatives are obligated "to negotiate in good faith." The purpose of collective bargaining/negotiations is to avoid "strife among employers and employees by establishing terms and conditions governing the employment relationship." See *Appeal of the State of New Hampshire*, 147 N.H. 106, 109 (2001). Therefore, a public employer's "unilateral change in a term or condition of employment ... is tantamount to a refusal to negotiate that term and destroys the level playing field necessary for productive and fair labor negotiations." *Appeal of Hillsboro-Deering Sch. Dist.*, 144 N.H. 27, 30 (1999). RSA 273-A:1, XI defines "terms and conditions of employment" as follows:

> wages, hours and other conditions of employment other than managerial policy within the exclusive prerogative of the public employer, or confided exclusively to the public employer by statute or regulations adopted pursuant to statute. The phrase 'managerial policy within the exclusive prerogative of the public employer' shall be construed to include but shall not be limited to the functions, programs and methods of the public employer, including the use of technology, the public employer's organizational structure, and the selection, direction and number of its personnel, so as to continue public control of governmental functions.

In this case, the parties' agreed upon terms and conditions of employment are covered by a CBA. "A CBA is a contract between a public employer and a union over the terms and conditions of employment. When parties enter into a CBA, they are obligated to adhere to its terms, which are the product of their collective bargaining." *Appeal of the City of Manchester*, 153 N.H. 289, 293 (2006) (citations and quotation marks omitted). Therefore, the parties are obligated to negotiate any changes to the existing agreed upon terms and/or conditions of employment covered by the CBA currently in force, regardless of whether these terms or conditions were originally mandatory or permissive subjects of bargaining.[5] These agreed upon terms or conditions of employment include those concerning reimbursement for travel/lodging expenses associated with professional improvement set forth in the current CBA Article 4.3.

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[5] The subject of reimbursement for professional improvement-related travel/lodging expenses is clearly not a prohibited subject of bargaining under the test set forth by the Supreme Court in *Appeal of State*, 138 N.H. 716, 724 (1994):

> First, to be negotiable, the subject matter of the proposed contract provision must not be reserved to the exclusive managerial authority of the public employer by the constitution, or by statute or statutorily adopted regulation.... Second, the proposal must primarily affect the terms and conditions of employment, rather than matters of broad managerial policy....Third, if the proposal were incorporated into a negotiated agreement, neither the resulting contract provision nor the applicable grievance process may interfere with public control of governmental functions contrary to the provisions of RSA 273-A:1, XI. A proposal that fails the first part of the test is a prohibited subject of bargaining. A proposal that satisfies the first part of the test, but fails parts two or three, is a permissible topic of negotiations, and a proposal that satisfies all three parts is a mandatory subject of bargaining.

The reference to "statute" reserving particular subjects to the exclusive managerial authority of the public employer means statutory authority independent of the managerial policy exception expressed in RSA 273-A:1, XI. See *Appeal of Nashua Board of Education*, 141 N.H. 768,774 (1997). In this case, the professional improvement contract provision is not reserved to the Board's exclusive managerial authority by the constitution, statute, or regulation.

During the negotiations on the current CBA, the Board proposed changes to Article 4.3. These proposed changes were not accepted by the Association. The Board later withdrew its proposal. After withdrawing its proposal, the Board unilaterally issued a so-called "policy PI." This policy covers the same subject matter as that covered by Article 4.3 of the CBA, including travel/lodging expenses reimbursement related to professional improvement courses, workshops, seminars, and/or conferences. In its policy, which is the equivalent of a "rule" under RSA 273-A:5, I (i), the Board added new terms/conditions, such as caps on amount of per diem reimbursement rate for meals, maximum amount of lodging expenses per room per day, possession of equipment gifted to conference attendees, and the statement that lodging expenses "will only be paid for the required attendance dates of the workshop or conference." All these new terms/conditions are contrary to the language of the current CBA as they significantly alter the negotiated terms set forth in the CBA. By issuing this policy, the Board, in fact, amended the parties' CBA without negotiating the amendment with the Association and invalidated some provisions of Article 4.3. Such unilateral amendment, whether it is called "clarification" or "interpretation," as the Board attempts to characterize it in this case, defeats the purpose of collective bargaining as expressed in RSA 273-A and violates the statutory requirement to negotiate in good faith over terms and conditions of employment.

The Board argues, among other things, that it acted within its exclusive managerial prerogative when it unilaterally created the new policy PI. The Board's argument is unpersuasive.

RSA 273-A:1, XI provides in part that:

> The phrase 'managerial policy within the exclusive prerogative of the public employer' shall be construed to include but shall not be limited to the functions, programs and methods of the public employer, including the use of technology, the public employer's organizational structure, and the selection, direction and

> number of its personnel, so as to continue public control of governmental functions.

The parties' CBA does not contain a "management rights" provision that could, arguably, reserve any additional rights to the management.[6]

In this case, the Board's policy PI does not affect functions, programs or methods of the School District, such as technology, organizational structure or selection, direction or number of the District's personnel. Rather, it directly affects bargaining unit employees in that professional improvement is essential to an employee's ability to maintain necessary employment qualifications and to attain the higher step in the contractual salary schedule, and the travel/lodging reimbursement system enables the employees to attend necessary professional improvement events. Therefore, the reimbursement for travel/lodging expenses associated with professional improvement primarily affects bargaining unit employees' terms and/or conditions of employment rather than broad "managerial policy."

For the foregoing reasons, I find that the Board failed to negotiate changes to the terms and/or conditions of employment set forth in the parties' CBA and unilaterally issued a policy/rule that invalidated a portion of the CBA. These actions violate RSA 273-A:5, I (e) and (i), respectively.

B. Breach of Contract

The Association also asserts that the Board's actions constitute a breach of the parties' CBA. A CBA is "a contract between a public employer and a union over the terms and conditions of employment. When parties enter into a CBA, they are obligated to adhere to its terms, which are the product of their collective bargaining." *Appeal of the City of Manchester*, 153 N.H. supra, at 293 (citations and quotation marks omitted). In interpreting a CBA, a court

[6] The Board's reliance on Article 9.4 of the CBA is misplaced as nothing in this article allows the Board to adopt policies that alter, modify, add to or interpret the existing agreed upon CBA terms.

begins "by focusing upon the language of the CBA, as it reflects the parties' intent. This intent is determined from the agreement taken as a whole, and by construing its terms according to the common meaning of their words and phrases." See *Appeal of Nashua Police Commission*, 149 N.H. 688, 690 (2003) (citations and quotation marks omitted)." Absent fraud, duress, mutual mistake, or ambiguity, the search for the parties' intent must be restricted to the words of the contract. See *Appeal of Town of Durham*, 149 N.H. 486, 487 (2003). A contractual clause is ambiguous "when the contracting parties reasonably differ as to its meaning." *Appeal of Nashua Police Commission*, supra, 149 N.H. at 690.

In this case, the parties' CBA, Article 11.1, specifically provides that the "agreement may not be altered, changed, added to, deleted from or modified without the voluntary, mutual consent of the parties in a written and signed amendment to this agreement." The CBA Article 11.1 language is clear and unambiguous and requires the Board to obtain the Association's consent, in writing, before altering, changing, adding to, deleting from or modifying the agreement. The Board, in its policy PI, clearly added terms to the CBA Article 4.3, thereby altering the terms of agreement without first obtaining the Association's consent, as the Board was required to do under the CBA Article 11.1. The Board's actions, therefore, constitute a breach of contract prohibited under RSA 273-A:5, I (h).

C. Past Practice

Finally, the Association argues that the Board's refusal to reimburse Ms. Bravar for a hotel stay on a night before the pre-approved professional improvement conference violated the long standing past practice. Past practice and other extrinsic evidence may be examined to discern the intent of the parties where the language of a CBA is ambiguous or "the contract is entirely silent." See *AFSCME Local 3657, Hillsborough County Sheriff's Office v. Hillsborough*

County, PELRB Decision No. 2012-117. See also *Appeal of N.H. Dep't of Safety*, 155 N.H. 201, 208-09 (2007). Moreover, "[a]n employer's practices,

> even if not required by a collective-bargaining agreement, which are regular and long standing, rather than random or intermittent, become terms and conditions of [union] employees' employment, which cannot be altered without offering their collective-bargaining representative notice and an opportunity to bargain over the proposed change. A practice need not be universal to constitute a term or condition of employment, as long as it is regular and longstanding.

Appeal of New Hampshire Department of Corrections, 164 N.H. 307, 309 (2012) (citation and internal quotation marks omitted). To establish a past practice, a party must show that the alleged practice "occurred with such regularity and frequency that employees could reasonably expect [it] to continue or reoccur on a regular or consistent basis. In addition, [i]t is implicit in establishing a past practice that the party which is being asked to honor it ... be aware of its existence." *Id.* (Citation and internal quotation marks omitted.)

The evidence in this case demonstrates that the Board approved bargaining unit employees' requests for reimbursement for a hotel stay on a night before the approved conference/workshop since at least 2009. This practice occurred with sufficient regularity and frequency to create a reasonable expectation that it will continue, and the Board was aware of its existence and had regularly reviewed and approved these requests for reimbursement. Therefore, the Board violated a long standing past practice when it denied Ms. Bravar's request for reimbursement for a hotel stay on the night before the pre-approved conference in Boston.

Based on the foregoing, the Board committed an unfair labor practice in violation of RSA 273-A:5, I (e), (h), and (i). The evidence is insufficient to prove that the Board violated RSA 273-A:5, I (a), (b), or (c) and these claims are, therefore, dismissed.

Accordingly, the Board shall cease and desist from unilaterally changing any terms or conditions of employment, including those set forth in the CBA Article 4.3, from breaching the

parties' CBA, and from adopting any rules, regulations or policies that would invalidate any portion of the parties' CBA. The Board shall cease and desist from applying the "policy PI" to the bargaining unit employees. The Board shall negotiate with the Association all changes, additions, modifications, alterations, interpretations or clarifications of professional improvement-related travel/lodging reimbursement terms as well as all other terms and conditions of employment.

So ordered.

Date: 10/17/2016

Karina A. Lange, Esq.
Staff Counsel/Hearing Officer

Distribution: Christopher Long, UniServ Director
Kathleen Peahl, Esq.

Appeal to NH Supreme Court withdrawn on 07-14-2017. (NH Supreme Court Case No. 2017-0091)

STATE OF NEW HAMPSHIRE
Public Employee Labor Relations Board

Prospect Mountain High School Teachers' Association, NEA-NH

v.

Prospect Mountain High School Board

Case No. E-0108-7
Decision No. 2016-283

Order on Request for Review of a Decision of Hearing Officer

On October 25, 2016 the Prospect Mountain High School Board filed a motion for review of hearing officer Decision No. 2016-233 (October 17, 2016). We review motions for review of hearing officer decisions under the following rule:

Pub 205.01 Review of a Decision of Hearing Officer.

(a) Any party to a hearing or intervenor with an interest affected by the hearing officer's decision may file with the board a request for review of the decision of the hearing officer within 30 days of the issuance of that decision and review shall be granted. The request shall set out a clear and concise statement of the grounds for review and shall include citation to the specific statutory provision, rule, or other authority allegedly misapplied by the hearing officer or specific findings of fact allegedly unsupported by the record.

(b) The board shall review whether the hearing officer has misapplied the applicable law or rule or made findings of material fact that are unsupported by the record and the board's review shall result in approval, denial, or modification of the decision of the hearing officer. The board's review shall be made administratively based upon the hearing officer's findings of fact and decision and the filings in the case and without a hearing or a hearing de novo unless the board finds that the party requesting review has demonstrated a substantial likelihood that the hearing officer decision is based upon erroneous findings of material fact or error of law or rule and a hearing is necessary in order for the board to determine whether it shall approve, deny, or modify the hearing officer decision or a de novo hearing is necessary because the board concludes that it cannot adequately address the request for review with an order of approval, denial, or modification of the hearing officer decision. All findings of fact contained in hearing officer decisions shall be presumptively reasonable and lawful, and the board shall not consider requests for review based upon objections to hearing officer findings of fact

unless such requests for review are supported by a complete transcript of the proceedings conducted by the hearing officer prepared by a duly certified stenographic reporter.

Since the School Board's motion is not supported by a duly prepared transcript of the proceedings, the hearing officer's findings of fact are not subject to review per Pub 205.01 (b). We have reviewed the hearing officer's decision in accordance with the provisions of Pub 205.01 and unanimously approve the hearing officer's decision and deny the School Board's motion.

So ordered.

Date: 12/2/16

Peter Callaghan, Esq., Chair

By vote of Alternate Chair Peter Callaghan, Esq., Board Member Richard J. Laughton, Jr., and Board Member James M. O'Mara, Jr.

Distribution: Christopher Long, UniServ Director
Kathleen Peahl, Esq.

Appeal to NH Supreme Court withdrawn on 07-14-2017 (NH Supreme Court Case No. 2017-0091)

STATE OF NEW HAMPSHIRE
Public Employee Labor Relations Board

Prospect Mountain High School Teachers' Association, NEA-NH

v.

Prospect Mountain High School Board

Case No. E-0108-7
Decision No. 2017-007

Order on Motion for Rehearing

The School Board filed a motion for rehearing of PELRB Decision No. 2016-283 (December 2, 2016) on January 3, 2017. The Association filed an objection on January 6, 2017. Motions for rehearing are governed by RSA 541:3 and Pub 205.02, which provides in part as follows:

> **Pub 205.02 Motion for Rehearing.**
>
> (a) Any party to a proceeding before the board may move for rehearing with respect to any matter determined in that proceeding or included in that decision and order within 30 days after the board has rendered its decision and order by filing a motion for rehearing under RSA 541:3. The motion for rehearing shall set out a clear and concise statement of the grounds for the motion. Any other party to the proceeding may file a response or objection to the motion for rehearing provided that within 10 days of the date the motion was filed, the board shall grant or deny a motion for rehearing, or suspend the order or decision complained of pending further consideration, in accordance with RSA 541:5.

Upon review, the School Board's Motion for Rehearing is denied.

So ordered.

Date: 1/17/17

Peter Callaghan, Esq., Chair

By vote of Alternate Chair Peter Callaghan, Esq., Board Member Richard J. Laughton, Jr., and Board Member James M. O'Mara, Jr.

Distribution: Christopher Long, UniServ Director
Kathleen Peahl, Esq.